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FEDERAL BUREAU OF INVESTIGATION

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July 6, 1998

HAND DELIVERY

Ms. Magalie Roman Salas  
Secretary  
Federal Communications Commission  
1919 M Street, N.W.  
Room 222  
Washington, DC 20554

Re: Reply of Omnipoint Communications Inc.  
CC Dkt. No. 96-115

Dear Ms. Salas:

Enclosed please find an original and eleven (11) copies of the Reply of Omnipoint Communications Inc. filed in the above-captioned matter.

If you have any questions, please feel free to contact me.

Sincerely,

*James J. Halpert*

James J. Halpert

JJH/spj  
Enclosure

Noted and signed  
by [signature]

RECEIVED

**Before the  
Federal Communications Commission  
Washington, D.C.**

JUL - 6 1998

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In the Matter of	)	
	)	
Implementation of the	)	
Telecommunications Act of 1996:	)	
	)	
Telecommunications Carriers' Use	)	CC Dkt. No. 96-115
of Customer Proprietary Network	)	
Information and Other Information	)	
	)	

**REPLY OF OMNIPPOINT COMMUNICATIONS, INC.**

Omnipoint Communications, Inc. ("Omnipoint"), by its attorneys, hereby replies to the oppositions and comments filed in response to the petitions for reconsideration and clarification of the Second Report and Order<sup>1</sup> ("Order") in the above-captioned proceeding.

In its May 26, 1998 "Petition for Reconsideration and Clarification," Omnipoint sought reconsideration and clarification of three principal aspects of the Order: *first*, application of the prohibition in § 65.2005(b)(1) barring the use of CMRS CPNI to market new CMRS CPE or new CMRS information services to existing customers; *second*, the onerous software and electronic audit requirements of § 65.2009; and *third*, the anti-win-back rule of § 65.2005(b)(3). Omnipoint also petitioned the Commission to clarify that use of CPNI in customer loyalty programs is permissible under Section 222 and the Commission's rules, and furthermore noted that an opt-out rule is entirely consistent with the language of Section 222, and is a more sensible means of protecting consumer privacy in the highly competitive CMRS marketplace than the opt-in rule adopted in the Order.

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<sup>1</sup> Second Report and Order and Further Notice of Proposed Rulemaking, CC Dkt. Nos. 96-115, 97-149, FCC 98-27, 63 Fed. Reg. 20327 (April 24, 1998).

The majority of petitioners and commenters that addressed the CMRS CPE and information service marketing, safeguards, and win-back issues have agreed that the Commission should sharply reduce or forbear from applying the Order's restrictions in each of these areas. Furthermore, while parties disagree about whether the Commission should alter its rules with respect to other telecommunications carriers, none have disagreed with the position of Omnipoint and other CMRS providers that these rules are inappropriate for the CMRS marketplace.<sup>2</sup>

In this reply, Omnipoint addresses three aspects of its Petition, as well as an issue raised by Vanguard relating to liability for independent agents. *First*, Omnipoint asks the Commission to revise its rules to make clear that when a CMRS carrier already provides a customer with a CMRS information service or CMRS handset, it may use CPNI derived from CMRS telecommunications to market upgrades of CMRS information services or handsets. *Second*, the Commission is under no obligation to take the regulatory approach for integrated wireline service offerings and blindly apply that to CMRS; both the plain meaning of Section 222 and the historically deregulatory approach the Commission has taken toward CMRS regulation support the implementation of more flexible CPNI rules in the CMRS marketplace. *Third*, as Comcast, BellSouth, and Omnipoint urge, the Commission should clarify that customer loyalty programs are permissible under § 64.2005. *Finally*, the Commission should adopt reasonable limitations on the liability of carriers for the actions of independent agents.

**I. THE COMMISSION SHOULD REVISE ITS RULES TO CLARIFY THAT CPNI OBTAINED THROUGH THE PROVISION OF CMRS TELECOMMUNICATIONS MAY BE USED TO MARKET NEW CMRS CPE OR NEW CMRS INFORMATION SERVICES.**

Every petitioner and commenter addressing the issue has agreed that the Commission should expressly permit a CMRS carrier to use CPNI derived from its provision of CMRS

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<sup>2</sup> See, e.g., MCI Opposition at 24-25; BellSouth Comments at 5-8.

telecommunications service to market upgraded CMRS handsets and information services. Whereas ILECs and CLECs/IXCs disagree sharply over whether the Commission should allow CPNI to be used to market *wireline* CPE and landline information services,<sup>3</sup> there is unanimity on the need for the Commission to change course with respect to use of CPNI to market upgrades of CMRS handsets and CMRS information services.

Applying the restrictions of § 64.2005(b)(1) in this context is contrary to the plain language of 47 U.S.C. § 222(c)(1)(B), as well as to the Commission's total service approach. As Omnipoint and other CMRS carriers have demonstrated, under the service-specific analysis required by § 222(c)(1)(A) and (B), CMRS handsets and information services are "necessary to or used in" the provision of CMRS telecommunications.<sup>4</sup> Furthermore, because the use of CMRS CPNI to market CMRS handsets and information services is entirely within consumer expectations, and serves the public interest by encouraging innovation, a customer opt-in requirement for such uses would be contrary to the total service approach and the logic of the Order itself.<sup>5</sup>

The Common Carrier Bureau's May 21, 1998 Order ("Clarifying Order")<sup>6</sup> made significant progress in addressing the above concerns. However, as many petitioners urge, this issue is sufficiently important that the Commission should revise its rules governing these uses of CPNI, and should further refine the principles set forth in the Clarifying Order.

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<sup>3</sup> Compare, e.g., BellSouth Comments at 5-8; U S West Support and Opposition at 2 n.2, with, MCI Opposition at 24-45; and AT&T Opposition and Comments at 10-12.

<sup>4</sup> See, e.g., Omnipoint Petition at 4-7; Vanguard Petition at 4-7, 9-12.

<sup>5</sup> See, e.g., Omnipoint Petition at 7-9.

<sup>6</sup> Order, CC Dkt. No. 96-115, DA 98-971, at ¶¶ 2-7 (rel. May 21, 1998).

In Omnipoint's view, the Commission need only make modest changes to the principles set forth in the Clarifying Order. Omnipoint urges the Commission to amend its rules to specify that a CMRS carrier already providing a customer with a CMRS information service or a CMRS handset may use CPNI derived from its provision of CMRS telecommunications to market upgrades of CMRS information services or handsets. This approach would be clearer than that of the Clarifying Order (at ¶7) because it would avoid confusion as to what constitutes "a new bundled plan," and what are "similar information services."<sup>7</sup> It would also avoid creating an artificial regulatory incentive for carriers to package the new CMRS handset or new CMRS information services in a bundled plan, rather than adopting a discrete price for the new item, which may be more appropriate for consumers satisfied with their existing level of service.

This proposed revision to the Commission's CPNI rules would make minimal changes to the Clarifying Order, in contrast to broader requests to permit use without customer approval of CPNI derived from wireline telecommunications to market information services or CPE.<sup>8</sup> This rule would comply fully with the plain language of Section 222(c)(1)(B) of the Act because the upgrades would all be "necessary to or used in" provision of the customer's CMRS service. Such a rule would be entirely consistent with the total service approach because customers fully expect CPNI to be used for offers of upgrading categories of service that they already receive. Furthermore, the rule would serve the competitive considerations underlying Section 222

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<sup>7</sup> For example, the Clarifying Order is sufficiently ambiguous to leave room for complaints on how "similar" a new CMRS information service is relative to a customer's existing service, as well as concern by carriers that they must artificially alter other elements of their integrated CMRS service offering, purely for regulatory purposes, in order to use CPNI for marketing of upgraded handsets.

<sup>8</sup> See, e.g., U S West Support and Opposition at 2 n.2; BellSouth Comments at 5-8.

because carriers would not be able to leverage access to CPNI to gain an artificial advantage in competitive new markets.<sup>9</sup>

## **II. IDENTICAL CPNI RULES NEED NOT AND SHOULD NOT APPLY TO WIRELESS AND WIRELINE SERVICES.**

Some petitioners suggest that if the Commission permits use of CPNI derived from CMRS telecommunications to market CMRS information services and handsets, the Commission must or should adopt a similar rule in the wireline context.<sup>10</sup> The Commission is by no means constrained to take an across-the-board approach to integrated information services and CPE. Section 222 does not require such a conclusion. Furthermore, the advanced state of competition in the wireless industry and the Commission's very different history of regulating wireless services argue against such a uniform rule.

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<sup>9</sup> See, e.g., Order at ¶¶ 37, 66; MCI Opposition at 5.

In the alternative, if the Commission denies the petitions to reconsider the restrictions on use of CMRS CPNI to market upgraded CMRS information services and handsets, Omnipoint asks the Commission to adopt an opt-out rule for use of CMRS CPNI for these purposes. It is MCI, not Omnipoint, that "has the competitive goals of Section 222 backwards" in opposing an opt-out rule for use of wireless CPNI to market wireless services. MCI Opposition at 54-55. As long as the opt-out does not apply to use of wireless CPNI in wireline markets (and vice-versa), the rule would not allow any "large incumbent" to exploit its access to CPNI "in breaking into a new market." C.f., id. at 55. Conversely, under the total service approach of the Order, "large incumbents" who have already penetrated the wireless market would enjoy a major artificial competitive advantage because they may use CPNI derived from wireline service to market their CMRS service. Their superior resources would also put them at a further advantage vis-à-vis the new entrant since they may be better able to obtain opt-ins from their wireless and wireline customers to market CMRS information services and handsets. For these reasons, the Order's interpretation of the total service approach would have a far more adverse effect on competition in CMRS than the proposed opt-out rule.

<sup>10</sup> See, e.g., BellSouth Comments at 4.

As Omnipoint and Vanguard made clear in their petitions,<sup>11</sup> § 222(c)(1)(B) of the Act requires a functional, particularized analysis of the service in question. Consequently, although Section 222 applies to "[e]very telecommunications carrier," *id.* at § 222(a), it does not apply to every carrier in the same way and it does not require an identical *regulatory process* of compliance for today's very different wireline and wireless markets.

Many carriers, including those with significant wireline interests, agreed that the CPNI rules need to be tailored and moderated to account for the CMRS market.<sup>12</sup> However, a few commenters (predominantly the incumbent LECs) objected and claimed that Section 222 demands that single set of CPNI rules should apply to every telecommunications carrier, regardless of the differences between CMRS and wireline services.<sup>13</sup>

The commenters opposing a more flexible regulatory approach for CMRS claim that the Section 222(a) statutory language, applying CPNI obligations to "every telecommunications carrier," requires a uniform set of regulations for all markets in the telecommunications sector. As explained above, this interpretation is at odds with the Order itself, which recognizes Congress' intent that Section 222 be interpreted in ways that meet customer expectations and promote competition. *Id.* at ¶¶ 24, 54-55. For CMRS (and especially new PCS entrants), this means the Commission should be careful not to overregulate in ways that stifle CMRS competition, even if such regulations are appropriate in the wireline context. See also, 47 U.S.C. § 161 (FCC shall review regulations and "repeal or modify" those that are not "necessary in the public interest as a result of meaningful competition between providers of such service").

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<sup>11</sup> Omnipoint Petition at 4-7; Vanguard Petition at 4-6.

<sup>12</sup> See AT&T Opposition and Comments at 5-9; MCI Opposition at 24-25.

<sup>13</sup> See BellSouth Comments at 13; US West Support and Opposition at 18; Bell Atlantic Opposition 1-2.

More generally, those commenters advocating a monolithic regulatory approach also fail to take into account the last five years of significant FCC deregulation of CMRS telecommunications carriers.<sup>14</sup> As the Commission noted in the Third Annual CMRS Competition Report<sup>15</sup> "substantial progress has been made towards a truly competitive mobile telephone marketplace." This progress is the measurable result of the Commission's decisions to deregulate and to open the CMRS market to competition.<sup>16</sup> Just two weeks ago, the Commission continued its CMRS deregulatory path by granting Section 10 forbearance of several Title II provisions and regulations, including international tariffing and some TOCSIA obligations for CMRS operators.<sup>17</sup> While these obligations may facially have applied broadly to all telecommunications carriers, the Commission correctly found that the CMRS marketplace and consumers are better served by a lesser degree of regulation. By contrast, it is beyond question that at least some significant portions of the wireline industry are not at all competitive.<sup>18</sup> This same principled distinction between appropriate regulation in the wireline and wireless contexts should guide the Commission's revisions to its CPNI rules.

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<sup>14</sup> See Omnipoint Petition at 12-15; CTIA Request for Deferral and Clarification at 19-21.

<sup>15</sup> *Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Mobile Services*, Third Report, FCC 98-91 at 2 (Rel. June 11, 1998).

<sup>16</sup> *Id.* at 64 (competition in CMRS industry is a product of FCC policies of licensing spectrum for CMRS new entrants and service flexibility).

<sup>17</sup> *Commission Grants In Part and Denies In Part PCIA's Petition for Forbearance*, FCC Public Notice, Rp't No. WT-98-18, WT Dkt. No. 98-100, GN Dkt No. 98-93 (Rel. June 23, 1998).

<sup>18</sup> See, e.g., 1996 Trends in Telephone Service, Industry Analysis Div. - CCB, at Table 9.1 (Feb. 1998) (ILECs held a 99% share of nationwide local service revenues in 1996).



### **III. THE COMMISSION SHOULD CLARIFY THAT PRIOR CUSTOMER APPROVAL IS UNNECESSARY FOR USE OF CPNI FOR CUSTOMER LOYALTY PROGRAMS.**

Omnipoint's petition sought clarification that § 64.2005 does not require carriers to obtain customer approval before providing telecommunications customers with rewards, such as free equipment, for the purpose of customer retention.<sup>19</sup> Comcast and BellSouth also seek clarification of this issue, agreeing with Omnipoint that such rewards are offered "for the purpose of providing or marketing service offerings . . . already subscribed to by the customer" within the meaning of § 64.2005(a).<sup>20</sup> No commenter opposes this request. Because the clarification will ensure that consumers receive significant benefits from this competitive practice, the Commission should clarify that carriers may use CPNI in customer loyalty programs without customer approval.

### **IV. THE COMMISSION SHOULD PROVIDE CARRIER'S WITH SOME PROTECTION FROM LIABILITY FOR THE ACTIONS OF INDEPENDENT AGENTS.**

Vanguard's petition seek clarification of the extent to which CMRS providers are liable for the actions of independent agents. Vanguard Petition at 18-19. Omnipoint agrees that this is an important issue for the CMRS industry because CMRS consumers often arrange for service through independent agents. As Vanguard explains, independent agents may sell the services of several different CMRS providers and paging providers at one location. Id. at 19. These agents thereby receive direct access to some types of CPNI before the carrier obtains it, and could engage in unauthorized use of CPNI derived from the sale of one service to sell a different service in ways that CMRS carriers are unable to prevent.

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<sup>19</sup> Omnipoint Petition at 19.

<sup>20</sup> Comcast Petition at 16-17; BellSouth Comments at 9.

Omnipoint agrees that a total exemption for independent agents would create a loophole in the statutory scheme.<sup>21</sup> However, if the Commission decides to clarify the application of its CPNI rules to independent agents it should reject MCI's sweeping view of agency liability, and set forth limitations on a carrier's liability for the actions of an independent agent. For example, carriers should not bear responsibility for the ultra vires acts of their independent agents, and should not be liable for an independent agent's conduct unless the carrier has ratified the conduct. These core principles of agency law must apply if convenient marketing of CMRS service by independent agents is to remain viable.

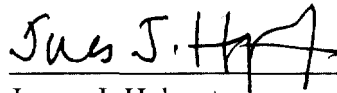
## V. CONCLUSION

For the foregoing reasons, Omnipoint urges the Commission to reconsider and clarify portions of its Order to better reflect Section 222's balance between the important purposes of promoting competition and consumer privacy.

Respectfully submitted,

OMNIPOINT COMMUNICATIONS, INC.

By:



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Date: July 6, 1998

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<sup>21</sup> MCI Opposition at 55-56.

## **CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing Reply of Omnipoint Communications, Inc. was this 6th day of July, 1998 hand delivered or mailed, postage prepaid to the following:

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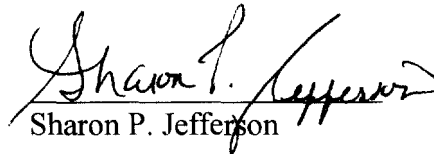
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